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TAY LYE SENG & ANOR

v.

NAZORI TEH & ANOR

b

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA
ABDUL MALEK AHMAD JCA
DENIS ONG JCA
[CIVIL APPEAL NO: J-02-51 OF 1996]
20 JULY 1998

c

TORT: *Damages - Special damages - Loss of earnings - Earnings obtained from an illegal source - Whether maxim ex turpi causa non oritur actio applies*

d

EQUITY: *Maxims of equity - An action does not arise from a base cause - Ex turpi causa non oritur action - Application in tort - Whether limited - Whether exclusive to contracts*

The issue in this appeal was whether a plaintiff in a personal negligence suit may claim as one of his damages loss of earnings obtained from an illegal source?

e

The two respondents herein were the rider and pillion rider of a motor cycle that was involved in a collision with a van driven by the first appellant, an agent of the second appellant. Liability was conceded at 50:50. Both respondents had claimed general and special damages. The question left to be decided was special damages as claimed by the first respondent under loss of earnings.

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In the court below, evidence was given that the first respondent had worked in Singapore as a labourer in a construction company. The appellants contended that this claim for loss of earnings should be disallowed as it was undisputed that at the time of the accident, the first respondent was working illegally in Singapore as his work permit had expired four months earlier. Since his earnings came from an illegal source, the appellants contended that the maxim *ex turpi causa non oritur actio* applied to bar the first respondent from succeeding on his claim for loss of earnings as such claim was against public policy.

*h**i*

Held:**Per Siti Norma Yaakob JCA**

- [1] While public policy would defeat any claim based on illegality, a balance has to be drawn based on the peculiar facts and circumstances of each case.
- [2] The maxim *ex turpi causa non oritur actio* has limited application in tort. The role of the maxim lies mainly and most exclusively in actions based on contract.
- [3] The fact that the first respondent had no valid work permit *per se*, could not affect his claim for loss of earnings in Singapore. This was because the first respondent was working legally in Singapore initially. He had a valid work permit issued by the Singapore authorities but unfortunately that expired four months before the accident. The obligation to renew the work permit laid squarely with the first respondent's employers and since there was no evidence that they had done so, the first respondent had therefore not been culpably responsible for the predicament that he later found himself to be in. In these circumstances, the maxim *ex turpi causa non oritur actio* lacked moral justification and was not applicable in this appeal.

[Appeal dismissed.]

[Bahasa Malaysia Translation of Headnotes]

Isu dalam kes ini adalah samada seorang plaintif dalam guaman kecuai persendirian boleh menuntut, sebagai satu dari gantiruginya, kehilangan pendapatan yang diperolehi dari sumber yang tidak sah.

Menurut fakta kes, kedua-dua responden adalah pemandu dan penumpang motorsikal yang terlibat dalam pelanggaran dengan van yang dipandu oleh perayu pertama, seorang agen perayu kedua. Tanggungannya diakui 50:50. Kedua-dua responden telah menuntut gantirugi am dan khas. Persoalan yang harus diputuskan adalah berkenaan dengan gantirugi khas yang dituntut oleh responden pertama di bawah tajuk kehilangan pendapatan.

Dalam mahkamah di bawah, keterangan diberi bahawa responden pertama bekerja di Singapura sebagai pekerja buruh dalam sebuah syarikat pembinaan. Perayu telah berhujah bahawa tuntutan tersebut untuk kehilangan pendapatan tidak harus dibenarkan kerana tidak dinafikan bahawa pada masa kemalangan tersebut, responden pertama sedang bekerja secara tak sah di Singapura kerana permit pekerjaannya telahpun luput empat bulan sebelum itu. Oleh kerana pendapatannya diperolehi dari suatu punca yang tidak sah, maka perayu

- a* behujah bahawa maksim *ex turpi causa non oritur actio* terpakai untuk menghalang responden daripada membuat tuntutan untuk kehilangan pendapatan kerana tuntutan tersebut adalah bertentangan dengan polisi awam.

Diputuskan:

Oleh Siti Norma Yaakob HMR

- b*
- [1] Meskipun polisi awam akan menyangkal sebarang tuntutan yang berdasarkan ketaksahan, suatu imbalan harus diadakan berdasarkan fakta-fakta khas dan keadaan kes tertentu.
- c*
- [2] Maksim *ex turpi causa non oritur actio* mempunyai pemakaian yang terhad dalam undang-undang tort. Fungsi maksim tersebut adalah lebih penting dan eksklusif dalam tindakan dalam kontrak.
- [3] Fakta bahawa responden pertama tidak mempunyai permit pekerjaan yang sah *per se* tidak boleh menjejaskan tuntutannya untuk kehilangan pendapatan di Singapore. Ini adalah kerana responden pertama telah bekerja di Singapore pada mulanya secara sah. Dia mempunyai permit pekerjaan yang sah yang dikeluarkan oleh pihak berkuasa Singapore tetapi malangnya ianya telah luput empat bulan sebelum kemalangan tersebut. Tanggungjawab untuk memperbaharui permit pekerjaan adalah terletak pada majikan responden pertama dan oleh kerana tidak ada keterangan bahawa mereka telah berbuat demikian, maka responden pertama tidak boleh dipersalahkan. Berdasarkan keadaan-keadaan tersebut, maksim *ex turpi causa non oritur actio* tidak mempunyai justifikasi moral dan tidak terpakai dalam rayuan ini.
- d*
- e*
- f* [Rayuan ditolak.]

Cases referred to:

- Burns v. Edman* [1970] 2 QB 541 (**dist**)
Chua Kim Suan & Teoh Teik Nam v. Government of Malaysia & Anor [1994] 1 CLJ 321 (**dist**)
g Dhlamini en'n Ander v. Protea Assurance Co Ltd 1974(4) SA 906 (A) (**dist**)
LeBagge v. Buses Ltd [1958] NZLR 630 (**refd**)
Ooi Han Sun v. Bee Hua Meng [1991] 3 MLJ 219 (**refd**)
Yaakub Foong Abdullah v. Lai Mun Keong [1986] 1 CLJ 355 (**refd**)

Legislation referred to:

- h* Road Traffic Ordinance 1958, s. 126
- For the appellants - S Radhakrishnan; M/s Shearn Delamore & Co*
For the respondents - S Gunasegaran; M/s John Ang & Jega

i

[Appeal from High Court, Johor Bahru; Civil Suit No: 23-173 of 1993; [1995] 4 CLJ 740]

Reported by Mariette Peters-Goh

JUDGMENT

Siti Norma Yaakob JCA:

This appeal raises an interesting and important point of law. It is this. Can a plaintiff in a personal negligence suit claim as one of his damages, loss of earnings obtained from an illegal source? Expressed in another way to what extent does the maxim *ex turpi causa non oritur actio* apply in actions based on tort? That issue arose from the following undisputed facts.

The two respondents before us were the rider and pillion passenger of a motor cycle that was involved in a collision with a van driven by the 1st appellant, an agent of the 2nd appellant. The accident happened near the 6th milestone along the Johor Bahru/Kota Tinggi road. In the court below, both respondents sued both appellants claiming general damages for the personal injuries sustained and special damages for other losses suffered. Although both appellants filed a joint statement of defence denying negligence on their part and put the cause of the accident solely on the negligence of the first respondent, at the trial, liability was conceded at 50:50, so also the general damages claimed by the first respondent at RM70,000 for pain and suffering and special damages at RM1,500. Claims for general and special damages by the second respondent were also agreed at RM13,000. That left only the question of two heads of special damages claimed by the first respondent to be decided, namely

(1) cost of nursing care and

(2) loss of earnings.

It is in respect of the second head of special damages that we are most concerned with in this appeal and in the court below, oral evidence was led by the first respondent and his two brothers to the effect that at the material time, the first respondent worked in Singapore as a labourer in a construction company known as Magsa Construction. Nobody from Magsa Construction testified on his behalf as the company was no longer in existence. In any event from the oral evidence adduced, the learned trial judge was able to assess the first respondent's monthly income and after making the necessary calculations as seen at p. 23 of the appeal record, he arrived at the total amount of S\$105,024 for loss of past and future earnings based on 100% liability.

- a* It is the appellants' contention that this claim for loss of earnings should be disallowed altogether as it is undisputed that at the time of the accident, the first respondent was working illegally in Singapore as his work permit had expired four months earlier. We have been told that the obligation to renew his work permit lies with his employer but there is no evidence to show that
- b* Magsa Construction had attempted to do so. In any event the parties have accepted that at the time of the accident the first respondent had no valid work permit to work in Singapore. Since his earnings came from an illegal source the appellants contend that the maxim *ex turpi causa non oritur actio* applies as to bar the first respondent from succeeding on his claim for loss of earnings as such claim is against public policy.

- c* This same issue has been discussed at great length by the then Supreme Court in the case of *Chua Kim Suan & Teoh Teik Nam (suing as the Administratrix and Administrator respectively of the Estate of Teoh Tek Lee, deceased) v. Government of Malaysia & Anor* [1994] 1 AMR 389. In that case the deceased
- d* was killed in a motor accident and his administrators sued the defendants for loss to the estate including loss of earnings. The respondents admitted liability and damages were assessed by the registrar who refused to take into account the monthly income of RM1,500 earned by the deceased in running an unlicensed taxi. There was evidence to show that a taxi licence was issued in
- e* 1976 to the deceased's father, who died in 1977. Thereafter the taxi continued to be operated by the deceased under the father's licence until 1982 when the deceased himself died without having ever applied for a taxi licence. This state of affairs was known by some of the Road Transport Department Officers, who never prosecuted the deceased in respect of it.
- f* The administrators appealed against the registrar's order but the appeal was dismissed by the High Court and the registrar's order was confirmed.

On a further appeal to the Supreme Court, Peh Swee Chin SCJ after reviewing a number of common law authorities had this to say:

- g* We have decided after most anxious consideration that any claim for loss of earnings from any illegal source should not be allowed on the ground that it is against public policy. We think that we would also follow, on this point, the decisions of *Ooi Han Sun*; *Burns*; *Lebagge and Dhlamini*, *supra* and approve the dictum in question in *Yaakob*. We therefore uphold the decision
- h* of the learned judge in the Court below and that of the learned Registrar at the first instance that the claim for that part of damages as related to earnings from the illegal operation of the taxi should be disallowed; because *ex turpi causa non oritur actio* or in other words, such claim would be against public policy. We would like to emphasize the timely caution of the learned Chief
- i*

Justice of Singapore in *Ooi* case, *supra*, that the maxim has a limited application in tort. The maxim's principal role lies mainly and almost exclusively in actions on contract.

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In *Ooi Han Sun v. Bee Hua Meng* [1991] 3 MLJ 219, the Singapore High Court had to deal with almost similar circumstances as that presented by the instant appeal before us. The first plaintiff was a Malaysian working in Singapore. At the time of the accident he was being transported to work on a motor pick-up driven by the defendant when the pick-up overturned. At that point of time he had not been issued with a work permit from the Singapore authorities. The learned Chief Justice when assessing the loss of earnings claimed by the first plaintiff had this to say:

*b**c*

As a rule of public policy, the maxim *ex turpi causa non oritur actio* (no cause of action arises out of a base cause) will apply in the law of contract to prevent a plaintiff founding a claim on an illegal act or agreement. It is clear, however, that the maxim has only very limited application in tort and, in general, the fact that the plaintiff is involved in some wrongdoing does not of itself provide the defendant with a good defence: *Henwood v. Municipal Tramways Trust (SA)* [1938] 60 CLR 438; *National Coal Board v. England* [1954] AC 403; [1954] 1 All ER 546; *Progress and Properties Ltd v. Craft* [1976] 12 ALR 59 *Jackson v. Harrison* [1978] 19 ALR 129. The only exceptions would appear to be the limited range of cases in which, on the facts of the case, an injury can be held to have been directly incurred in the course of the commission of a crime: *Godbolt v. Fittock* [1963] 63 SR (NSW) 617; [1964] NSW 22; *Smith v. Jenkins* [1970] 44 ALJR 78; *Ashton v. Turner* [1981] QB 137; [1980] 3 All ER 870; *Pitts v. Hunt & Anor.* [1990] 3 All ER 344.

*d**e*

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While, therefore, the first plaintiff would not be precluded from claiming against the defendant in this case in spite of his being on his way to work without having a work permit at the time of the accident, the question has to be considered again from the point of view of the quantum of damages to which he is entitled, and in particular, whether and to what extent his illegal earnings in Singapore at the time of the accident might be used as a basis for calculating his pre-trial loss of earnings and his future loss of earnings.

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In my judgment, the assessment of the first plaintiff's loss of earnings should be based on an estimate, however difficult and imprecise this might be, of what he would have earned in Malaysia had there been no accident to him. The immigration laws and regulations which require work permits to be obtained by foreign workers before they can work in Singapore were not designed merely to raise a little extra revenue, but to implement a basic public policy.

*h**i*

- a* To compensate the first plaintiff on the basis of what he might have earned by working illegally in Singapore without a valid work permit would be against public policy and wholly improper.
- On that reasoning the first plaintiff's loss of earnings was assessed on what he would have earned in Malaysia if there had been no accident.
- b* In *Burns v. Edman* [1970] 2 QB 541, the deceased was killed in a motor accident and his widow claimed damages for loss of dependency. The court held that since the deceased's earnings were derived solely from the proceeds of crime which the widow was fully aware, she was not entitled to claim such damages on the basis that *ex turpi causa non oritur actio* applied.
- c* In the New Zealand case of *LeBagge v. Buses Ltd.* [1958] NZLR 630, the issue raised was whether the deceased husband's infringement of certain regulations relevant to his trade of a milk float driver could defeat his widow's claim for damages. The Court of Appeal held it did not as the infringement
- d* was of minimal importance and it did not effect the milk contract under which the claim was based.
- In the South African case of *Dhlamini en'n Ander v. Protea Assurance Co. Ltd* 1974(4) SA 906(A), the plaintiff who was an unlicensed hawker for 20 years was denied her claim for damages for income lost from selling fruit on the ground that such a claim was against public policy.
- e*
- Lastly in the case of *Yaakub Foong bin Abdullah @ Foong Chin Liew v. Lai Mun Keong @ Lai Mun & Anor* [1986] 1 CLJ 355, M. Shankar, J (as he then was) had to deal with the claim of a Malaysian plaintiff working legally
- f* in Singapore. In assessing his earnings in Singapore, the court had also to consider his admissions that he paid no income tax to the Singapore authorities and that he did extra work in contravention of his work permit. The plaintiff contended that his admissions were not relevant in assessing his claim for loss of earnings. The learned judge held otherwise and expressed his view that had
- g* there been evidence of the amount of income tax due to the Singapore authorities and the amount he had illegally earned when contravening his work permit, he would have deducted such amounts from the earnings legally due.
- In the light of the decided cases, *supra*, we asked ourselves whether the learned trial judge in the instant appeal before us made the right finding of
- h* law when he decided that the first respondent could claim for his lost earnings in Singapore even though he had no valid work permit at the material time.
- The Supreme Court's decision in the *Chua's* case *supra*, and its approval of the decisions reached by the other common law jurisdictions in *Ooi Hun Sun*,
- i* *Burns*, *LeBagge* and *Dhlamini* left us with the conclusion that whilst public

policy would defeat any claim based on illegality, a balance has to be drawn based on the peculiar facts and circumstances of each case. In all the cases cited above, there is the element of culpability on the part of the plaintiff who claims for loss of earnings or support for the wrongdoing complained of or that the claim flowed directly from the wrongdoing. Where he is without fault, he may, it seems, recover according to the usual principles of measure of damages. Thus in *Chua's* case, the deceased never applied for a taxi licence when he was operating his taxi but instead assumed the one that was issued to his father but the licence was never transferred into his name during his lifetime. The deceased had committed an offence under s. 126 of the then Road Traffic Ordinance 1958 and he could have been prosecuted and for this very reason the estate of the deceased could not benefit from his earnings of the use of the unlicensed taxi.

Likewise *Burns* was decided on the basis that the widow was aware that her husband's earnings came directly from the profits of criminal offences. There was evidence that the deceased husband had no capital assets to support his family or that he had any honest employment during his lifetime. He had been imprisoned for three years for robbery in 1954 and convicted four years later of being an accessory before or after the fact to felony and sentenced to 21 months imprisonment. Since the claim for support flowed directly from the criminal offences, that factor prevented the widow from succeeding on her claim.

In *LeBagge's* case however, the illegality related to the infringement of the Transport Licensing Regulations 1950 of New Zealand which forbade the deceased husband to drive his milk float truck seven days a week but confined him to six days' work. He did in fact earn an extra pound a week by driving on the seventh day. The Court of Appeal allowed the earnings to be calculated on seven working days and ruled that the action filed by the widow was not affected by illegality as it was too minor to affect the fulfillment of the milk contract which necessitated the deceased husband driving the milk float truck in the first place.

In *Dhlamini's* case, the plaintiff was aware that she needed a licence to sell fruit as a hawker but her attempts on a number of occasions to obtain one had met with little success. Undaunted she continued with her hawking trade for some 20 years without a license and under those circumstances public policy barred her from claiming damages for income lost.

In *Ooi's* case, the High Court in Singapore whilst conceding that the first plaintiff cannot be precluded from claiming lost wages in spite of not being in possession of a work permit viewed the matter in the light of what effect illegality had on the question of damages to be awarded. It then concluded

a that had the accident happened in Malaysia the plaintiff would be entitled to claim for loss of earnings and on that basis calculated the amount due on earnings that he would have earned in Malaysia.

b Reverting to the circumstances of our instant appeal, we consider that the fact that the first respondent had no valid work permit, *per se*, cannot affect his claim for loss of earnings in Singapore. This is so as unlike *Chua's* case, the first respondent was working legally in Singapore initially. He had a valid work permit issued by the Singapore authorities but unfortunately that expired four months before the accident. We have been told that the obligation to renew the work permit lies squarely with the first respondent's employers and

c since there is no evidence that they had done so, we consider that the first respondent had not been culpably responsible for the predicament that he had found himself to be. Under these circumstances we consider that the maxim *ex turpi causa non oritur actio* lacked moral justification and to that end is not applicable to the instant appeal before us.

d As to the maxim's application in actions based on tort, we echo what was said by the Supreme Court in *Chua's* case "that the maxim has a limited application in tort. The maxim's principle role lies mainly and most exclusively in actions on contract."

e For the reasons appearing in this judgment, we see no reason to disturb the decision of the High Court and to that end we had dismissed the appeal with costs and ordered the deposit to be paid out to the respondents to account of their taxed costs.

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